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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUSAN JARZEMSKI, as Administrator, etc., Plaintiff and Appellant, v. ST. FRANCIS SEMINARY, ARCHDIOCESE OF SAN DIEGO et al., Defendants and Respondents.	D038798 (Super. Ct. No. P175309)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas R. Mitchell, Judge. Affirmed.

In this action contesting the validity of the amended Chatham Living Trust (the trust), plaintiff Susan Jarzemski, as special administrator of the estate of Kathleen Chatham (Mrs. Chatham), one of the deceased trustors, appeals from a summary judgment in favor of the named beneficiaries of the trust, defendants St. Francis

Seminary of the Archdiocese of San Diego (St. Francis) and Alzheimer's Disease Research (ADR).

When they set up the trust in 1990, Mrs. Chatham and her husband Albert Chatham (Mr. Chatham) disinherited Mrs. Chatham's two adult children from a prior marriage, George Swann and Jean Ann Turro. Nine years later, while Mrs. Chatham was still alive, Roma Stronach (Stronach) filed a petition in which she sought to be appointed as the successor trustee of the trust and requested that the court assume jurisdiction over the trust. Swann and Turro received notice of Stronach's petition, but did not oppose it. The court granted Stronach's petition in October 1999.

Early the following month, Swann, in his capacity as Mrs. Chatham's conservator, filed a petition to exercise her power of appointment under the trust to eliminate the disinheritance. Mrs. Chatham, however, died before the petition could be heard. In February 2000, Stronach mailed to Swann and Turro a notice under Probate Code[1] sections 16061.7[2] and 16061.8[3] (the section 16061.7 notice), informing them the trust

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1 All subsequent statutory references are to the Probate Code.

2 Subdivision (a)(1) of section 16061.7 provides: "(a) A trustee shall serve a notification by the trustee as described in this section in the following events: [¶] (1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust."

Subdivision (h) of that section provides: "If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, *the notification*

had become irrevocable, and any action to contest the validity of the trust had to be brought no more than 120 days from the date of the notification.

On September 8, 2000, more than 120 days after Stronach served the section 16061.7 notice, Jarzemski, who had not been served with that notice, filed a petition claiming the trust was invalid on the grounds that Mr. Chatham was an abusive spouse who had subjected Mrs. Chatham to undue influence. The court granted summary judgment in favor of St. Francis and ADR on the grounds the undisputed material facts established that Jarzemski's petition was barred both by the doctrine of res judicata and the applicable statute of limitations set forth in section 16061.8.

On appeal, Jarzemski contends the summary judgment must be reversed because (1) the prior court order appointing Stronach as the successor trustee and accepting jurisdiction over the trust "is not res judicata on the issue of the validity of the trust"; and (2) section 16061.7 does not create a general statute of limitations on trust contests, and thus her petition is not barred by the 120-day limitation period set forth in that section

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by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, *that states as follows:* [¶] *'You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later.'*" (Italics added.)

3 Section 16061.8 provides: "No person upon whom the notification by the trustee is served pursuant to this chapter may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later."

because Stronach did not serve her with the section 16061.7 notice that she (Stronach) served on Swann and Turro on February 18, 2000. Because the undisputed material facts show that Jarzemski's petition was time-barred, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arose after Mr. and Mrs. Chatham (together the Chathams) set up the the trust in 1990. The Chathams had executed wills in 1981 that left their estates first to each other and then to their respective children. When they created the trust, however, the Chathams disinherited all of their children, including Mrs. Chatham's two adult children from a previous marriage, Swann and Turro.

Mr. Chatham died in March 1998. In August 1998, about five months later, Swann was appointed to serve as the conservator of the person and estate of his mother, Mrs. Chatham, who suffered from dementia and Parkinson's disease.

In October 1999, the court granted a petition by Stronach, a private professional fiduciary, appointing her as the successor trustee of the trust and accepting jurisdiction over the administration of the trust. Swann and Turro received timely notice of Stronach's petition, but did not oppose the petition on any ground. In its order granting the petition, the court ordered the appointment of Stronach as successor trustee of the trust, and stated:

> "The court accepts jurisdiction over the administration of [the trust] pursuant to the terms of the Second Amendment to [the trust], which was executed January 8, 1998, and pursuant to [section] 17200."[4]

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4 Section 17200, subdivision (a) provides: "(a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or *to determine the existence of the trust*."

In early November 1999, Swann, as Mrs. Chatham's conservator, filed a petition to exercise her power of appointment to eliminate the disinheritance, alleging that the disinheritance was the result of undue influence by Swann's stepfather, Mr. Chatham. Mrs. Chatham died before Swann's petition could be heard.

On February 18, 2000, Stronach, as successor trustee, mailed to Swann and Turro the section 16061.7 notice, informing them the trust had become irrevocable, and any action to contest the validity of the trust had to be brought no more than 120 days from the date of the notification.

On June 14, 2000, Swann and Turro filed a petition claiming the trust was invalid on the grounds that Mr. Chatham was an abusive spouse who had subjected Mrs. Chatham to undue influence, thereby causing her to disinherit them. The court denied this petition without prejudice, finding that Swann and Turro lacked standing because under section 17200, subdivision (a),[5] only a trustee or trust beneficiary had standing to bring such a petition, and Swann and Turro were not trustees or trust beneficiaries.

Swann nominated Jarzemski to serve as special administrator of Mrs. Chatham's estate. In early August 2000, the court appointed Jarzemski to this position.

(Italics added.) Subdivision (b)(10) of that section provides: "(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes: [¶] . . . [¶] (10) *Appointing* or removing *a trustee*." (Italics added.)

5 See footnote 4, *ante*.

About four weeks later, on September 8, 2000—beyond the applicable 120-day limitations period specified in sections 16061.7 and 16061.8 (see fns. 2 & 3, *ante*) set forth in the section 16061.7 notice that Stronach had served on Swann and Turro on February 18, 2000—Jarzemski filed the petition that is the subject of the instant appeal. In the petition, Jarzemski repeated the claim unsuccessfully made by Swann and Turro that the trust was invalid because Mr. Chatham had been an abusive spouse who had subjected Mrs. Chatham to undue influence at the time they set up the trust. Jarzemski asserted that "absent such influence, [Mrs. Chatham] would not have disinherited her children [Swann and Turro]."

St. Francis, joined by ADR, challenged Jarzemski's petition by filing a motion for summary judgment. Respondents brought the motion on two grounds. First, under the doctrine of res judicata, Jarzemski's petition was barred by the October 1999 order granting Stronach's petition to be appointed as the successor trustee of the trust because Swann and Turro did not oppose Stronach's petition, they did not allege at that time that the trust was invalid due to undue influence, the order validated the trust, and they did not appeal that order. Second, Jarzemski's petition was barred by the 120-day limitation period set forth in section 16061.7 because (1) she filed the petition more than 120 days after Stronach, the successor trustee, served the section 16061.7 notice on Swann and Turro on February 18, 2000; and (2) although Stronach did not serve the section 16061.7 notice on Jarzemski, Stronach was not required to do so and, in any event, she (Stronach) could not have done so because Jarzemski had not yet been appointed as the special administrator of Mrs. Chatham's estate.

On July 17, 2001, the court entered an order granting summary judgment in favor of St. Francis and ADR on the grounds the undisputed material facts established that Jarzemski's petition was barred both by the doctrine of res judicata and the applicable 120-day statute of limitations set forth in section 16061.8. Jarzemski's timely appeal followed.[6]

STANDARD OF REVIEW

In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189 (*Branco*).) In practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court's determination of a motion for summary judgment. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1121-1122.)

Under Code of Civil Procedure section 437c, subdivision (c), a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Because the granting of a summary judgment motion involves pure questions of law, we are required to reassess the legal significance and effect of the

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6 Jarzemski purports to appeal from the order granting respondents' motion for summary judgment. "An order granting a motion for summary judgment is not an appealable order or judgment." (*Stoltz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1816.) In the interests of justice and to avoid delay, we construe Jarzemski's appeal as having been taken from a summary judgment rather than from the order. (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1264, fn. 1.)

papers presented by the parties in connection with the motion. (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397, 1408 (*Ranchwood*).)

We apply the same three-step analysis required of the trial court in ruling on a motion for summary judgment. (*Ranchwood*, *supra*, 49 Cal.App.4th at p. 1408.) First, we identify the issues framed by the pleadings because the court's sole function on a motion for summary judgment is to determine from the submitted evidence whether there is a "triable issue as to any material fact. . . ." (§ 437c, subd. (c).) To be "material" for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926 (*Zavala*)), and it must also be essential to the judgment in some way (*Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 470).

Second, we determine whether the moving parties (here, St. Francis and ADR) have met their statutory burden under section 437c of producing admissible evidence to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); see also *Zavala, supra,* 58 Cal.App.4th at p. 926.) Where a defendant is the moving party, we determine whether it has met its burden under subdivision (o)(2) of section 437c of producing admissible evidence showing that the cause of action has no merit because "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or [] there is a complete defense to that cause of action. . . ." In *Aguilar*, the California Supreme Court recently clarified that in addition to bearing the initial burden of

production, the party moving for summary judgment also bears the burden of persuading the court that there is no triable issue of material fact and that it is entitled to judgment as a matter of law.[7] (*Aguilar, supra*, 25 Cal.4th at p. 850.) Unlike the burden of production, the burden of persuasion never shifts to the party opposing the summary judgment motion. (*Ibid.*)

Finally, if the moving party has met its statutory burden of production and the summary judgment motion prima facie justifies a judgment, the burden of production shifts and we determine whether the opposing party (here, Jarzemski) has met the burden under Code of Civil Procedure section 437c to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850; see also *Zavala, supra,* 58 Cal.App.4th at p. 926 & Code Civ. Proc., § 437c, subd. (o)(1-2).) Where (as here) the plaintiff is the opposing party, we determine whether she has met her statutory burden of producing admissible evidence showing that "a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (o)(2).) In making this determination, we strictly construe the evidence of the moving party and liberally construe that of the opponent and any doubts

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[7] The *Aguilar* court explained that "a plaintiff bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto. ([Code Civ. Proc., §] 437c, subd. (o)(1).) A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. (*Id.*, § 437c, subd. (*o*)(2).)" (*Aguilar, supra*, 25 Cal.4th at p. 850.)

as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Branco, supra*, 37 Cal.App.4th at p. 189.)

DISCUSSION

I. *STATUTE OF LIMITATIONS*

Jarzemski contends the summary judgment must be reversed on the ground that section 16061.7 (see fn. 2, *ante*) does not create a general statute of limitations regarding trust contests. She maintains that her petition challenging the validity of the trust is thus not barred by the 120-day limitation period set forth in that section because Stronach, the successor trustee, did not serve her with the section 16061.7 notice that she (Stronach) had served on Swann and Turro notifying them (as Mrs. Chatham's disinherited heirs) that any action to contest the trust could not be brought more than 120 days from the date that notice was served. We reject these contentions and conclude the undisputed material facts establish that Jarzemski's petition was time barred. We thus also conclude that the court properly granted summary judgment in favor of St. Francis and ADR.

When St. Francis and ADR challenged Jarzemski's petition by filing their motion for summary judgment, the court granted the motion on the grounds the undisputed material facts established that the petition was barred both by the applicable 120-day statute of limitations and by the doctrine of res judicata (discussed, *post*).

It is undisputed that on February 18, 2000, Stronach served the section 16061.7 notice on Swann and Turro. That notice advised them of the applicable 120-day limitations period, stating in part:

> "As the Successor Trustee of [the trust], NOTICE IS HEREBY GIVEN to each of the beneficiaries of [Mrs. Chatham] in accordance with [section] 16061.7 as follows: [¶] . . . [¶] *YOU MAY NOT BRING AN ACTION TO CONTEST THE TRUST MORE THAN 120 DAYS FROM THE DATE THIS NOTIFICATION BY THE TRUSTEE IS SERVED UPON YOU* OR 60 DAYS FROM THE DAY ON WHICH A COPY OF THE TERMS OF THE TRUST IS MAILED OR PERSONALLY DELIVERED TO YOU IN RESPONSE TO YOUR REQUEST DURING THE 120 DAY PERIOD, WHICHEVER IS LATER." (Italics added.)

It is also undisputed that on June 14, 2000, Swann and Turro filed a timely petition claiming the trust was invalid on the grounds that Mr. Chatham had subjected Mrs. Chatham to undue influence when they set up the trust, causing her to disinherit them. In an order that Swann and Turro did not challenge, the court denied their petition without prejudice, finding they lacked standing because under section 17200, subdivision (a),[8] only a trustee or trust beneficiary had standing to bring such a petition, and they were neither trustees nor trust beneficiaries.

The undisputed material facts also establish that Swann thereafter nominated Jarzemski to serve as special administrator of Mrs. Chatham's estate, and the court appointed Jarzemski to that position in early August 2000. About four weeks later, on September 8, 2000, Jarzemski filed the petition that is the subject of the instant appeal, in which she (like Swann and Turro before her) challenged the validity of the trust on the grounds Mr. Chatham had subjected Mrs. Chatham to undue influence when they set up the trust.

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8 See footnote 4, *ante*.

The foregoing undisputed facts establish that after Swann recruited her, Jarzemski filed her petition on September 8, 2000, more than 120 days after Stronach served the section 16061.7 notice on Swann and Turro on February 18 of that same year.

It is undisputed that Stronach did not serve the section 16061.7 notice on Jarzemski, who was neither an heir of Mrs. Chatham nor a beneficiary of the trust. Jarzemski asserts the section 16061.7 notice was "not a notice to the world binding upon the world," but was a personal notice binding only upon those people who received it. We reject this contention.

Jarzemski relies on the phrase "is served upon him or her" contained in the language of section 16061.8 (see fn. 3, *ante*), which provides:

> "*No person upon whom the notification by the trustee is served* pursuant to this chapter may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later." (Italics added.)

Jarzemski also relies on the phrase "is served upon you" contained in the language of section 16061.7, subdivision (h) (see fn. 2, *ante*) which provides in part:

> "[T]he notification by the trustee shall also include a warning . . . that states as follows: 'You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee *is served upon you* or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later.'" (Italics added.)

These statutory phrases, Jarzemski maintains, should be construed to mean that only those persons to whom a section 16061.7 notice is sent are bound by the 120-day limitations period, and anyone who has not been served with such notice may bring an

action to contest a trust to which that notice pertains. In granting summary judgment in this matter, the court stated that "the Legislature says, 'Give the [section 16061.7] notice, and after 120 days everybody's precluded.'" The court found that "the persons entitled to notice were given notice."

The parties have cited no case law authority on point, and we are aware of none. We agree with Jarzemski that the interpretation of section 16061.7 is thus one of first impression.

The issue presented is whether as a matter of law the section 16061.7 notice served by Stronach on Swann and Turro in February 2000 began the running of the 120-day limitations period with respect to the trust contest action brought in September of that year by Jarzemski, upon whom the section 16061.7 notice was not served. We conclude it did. Jarzemski does not dispute that Stronach, as the successor trustee, served the section 16061.7 notice on everyone who was entitled to receive it. Jarzemski, as the subsequently appointed administrator of Mrs. Chatham's estate, does not claim, nor can she, that Stronach was required to serve her with a copy of the notice when Stronach sent it to those who had a right to receive it. It is undisputed that after Swann and Turro failed in their timely attempt to contest the trust on grounds of undue influence, they caused Jarzemski to be appointed as the administrator of Mrs. Chatham's estate for the purpose of bringing that same trust contest a second time.

Were we to hold that the section 16061.7 notice given by the successor trustee did not commence the running of the 120-day limitations period with respect to Jarzemski's action to contest the trust, the statute of limitations set forth in that section and section

16061.8 (see fn. 3, *ante*) would no longer serve to protect the trustee in making decisions related to the trust. An heir or beneficiary desiring to contest the trust could avoid the statute of limitations by creating or recruiting a person or entity who had not received the section 16061.7 notice and use that person or entity to file the contest. We are persuaded the Legislature enacted the short 120-day limitations period for the purpose of protecting trustees in the proper exercise of their decisionmaking power by permitting heirs and beneficiaries a reasonable opportunity to contest the validity of a trust and barring trust contests after the limitation period expires in cases in which the trustee has given proper statutory notice to those entitled to receive it. It is undisputed such notice was given in this case. We thus conclude the court properly ruled that Jarzemski's petition was time barred.

II. *RES JUDICATA*

Jarzemski also contends the summary judgment must be reversed because the prior court order appointing Stronach as the successor trustee, and accepting jurisdiction over the trust, "is not res judicata on the issue of the validity of the trust." In light of our determination that the court properly found that Jarzemski's petition was time barred, we are not required to address the question of whether the court properly found that the prior court order appointing Stronach as the successor trustee and accepting jurisdiction over the trust, which Swann and Turro did not challenge, operated as res judicata on the issue of the validity of the trust. Were it necessary to reach the merits of this issue, we would conclude Jarzemski's petition was not barred on this ground.

In August 1999, while Mrs. Chatham was still alive, Stronach filed the petition in which she sought to be appointed as the successor trustee of the trust and requested that the court assume jurisdiction over the trust. Swann and Turro received notice of Stronach's petition, but did not oppose it, and the court granted the petition in October 1999. Mrs. Chatham died about two months later in December 1999.

Because Mrs. Chatham was still alive when Stronach filed her petition, Swann and Turro were only contingent beneficiaries at that time and lacked standing to challenge the validity of the trust. Section 15800, subdivision (a) provides:

> "Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent: [¶] (a) *The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division*." (Italics added.)

Section 15800 generally operates to postpone the rights of trust beneficiaries while the settlor is still alive and the trust is revocable. The Law Revision Commission comment to section 15800 explains that "[t]his section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust." (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15800 p. 644; see also *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 88.) It thus appears that Swann and Turro lacked standing to file a trust contest at the time Stronach filed her petition, and under principles of res judicata the court's granting of that unopposed petition would not operate to bar a trust contest filed by Swann and Turro after the date of Mrs. Chatham's death.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.